Supreme Court, U.S.
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No. 03-1389

In The
Supreme Court of the United States

JUDICIAL WATCH, INC.,

Petitioner,

v.

INTERNAL REVENUE SERVICE,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

Respondent's Brief in Opposition ("Opp.") underscores the need for the Court to issue a writ of certiorari to review the appellate court's decision in this case. Absent from Respondent's brief is any serious attempt to explain how the appellate court's decision can be reconciled with the plain language of the Freedom of Information Act ("FOIA") or this Court's precedent. Left unanswered is how a government employee's name, appearing in an audit file on Petitioner at

the Internal Revenue Service ("IRS"), constitutes a personnel or medical or similar file, much less a "detailed Government record[] on an individual which can be identified as applying to that individual." *U.S. Dep't of State v. Washington Post*, 456 U.S. 595, 602 (1982). The only answer is through a wholly improper judicial expansion of FOIA's Exemption 6. Because of the broad and long-term ramifications of the appellate court's ruling, the petition should be granted.

Those ramifications extend far beyond this case. Petitioner, as a frequent user of FOIA, increasingly finds itself blocked by the improper application of Exemption 6 in its efforts to investigate "what the government is up to." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989). For example, in response to a recent FOIA request relating to government contracts awarded to a subsidiary of Halliburton Co. for work in Iraq, the Department of the Army redacted the names of government employees involved in the awards allegedly pursuant to Exemption 6. *See* Exhibits 1-3 attached hereto (*Judicial Watch, Inc. v. Department of the Army*, Case No. 04-0301 (D.D.C.)). These documents did not come from personnel, medical, or any type of remotely similar file. No readily identifiable privacy interests on the part of the employees were at stake. Nevertheless, Exemption 6 was invoked simply because government employees' names appeared in the documents. This on-going, improper application of Exemption 6 is exactly what is at issue in this case and is typical of Petitioner's recent experience in attempting to obtain information from the government through FOIA. It also is why review by this Court is necessary.

Respondent offers two basic arguments for why review of the appellate court's decision is allegedly not appropriate: (1) the appellate court's decision is purportedly consistent with decisions of other circuit courts; and (2) the appellate court's decision is allegedly consistent with past rulings of this Court. Opp. at 4-8.

Even though Petitioner did not assert the existence of a conflict among the circuit courts of appeal, Respondent cites a string of FOIA cases from other circuits ostensibly demonstrating that the appellate court's ruling is consistent with the rulings of other circuit courts and further demonstrating, allegedly, that the names of government employees are redacted routinely from government records. Opp. at 5-6. However, none of these cases addresses the issue of what constitutes a personnel, medical or similar file under FOIA's Exemption 6 or this Court's precedent. For example, in *Lakin Law Firm, P.C. v. FTC*, 352 F.3d 1122 (7th Cir. 2003), a FOIA requester sought the release of names of persons who had filed complaints with the Federal Trade Commission. The court applied a balancing test to determine whether the public interest in disclosure outweighed the privacy interest of the persons who had filed the complaints. However, in performing this balancing test the court failed to determine, as an initial matter, whether these names appeared in personnel, medical, or similar files about the persons making the complaints. The Seventh Circuit in *Lakin* thus made the very same error the appellate court made in this case: it ignored the entire first half of a proper Exemption 6 analysis. In doing so, both courts not only ignored this Court's precedent, but they also effectively re-wrote Exemption 6. *Lakin* thus *helps* to demonstrate why review by this Court is necessary. *See also Strout v. U.S. Parole*

Comm'n, 40 F.3d 136 (6th Cir. 1994) (applying balancing test to names of people who wrote to Parole Commission opposing granting parole to FOIA requestor/inmate.)

Respondent also cites *Sheet Metal Workers Int'l Ass'n v. Air Force*, 63 F.3d 994 (10th Cir. 1995) in support of its argument. At issue in that case was the release of the names and addresses of government employees contained in payroll records. However, the payroll records at issue in *Sheet Metal Workers* clearly constituted "personnel" files, and, thus, the court had no need to undertake a lengthy analysis of whether the files at issue were the types of files protected by Exemption 6. Respondent cites no fewer than four similar cases involving the release of names of government employees from personnel files. *Department of Defense v. FLRA*, 510 U.S. 487 (1994); *Department of Navy v. FLRA*, 975 F.2d 348 (7th Cir. 1992); *FLRA v. Department of Veterans Affairs*, 958 F.2d 503 (2nd Cir. 1992); *FLRA v. Department of Treasury*, 884 F.2d 1446 (D.C. Cir. 1989). Unlike this case, none of these cases involved a clear challenge to whether the "personnel and medical and similar files" provision of Exemption 6 even applied. As a result, they are unavailing to Respondent.

Respondent discusses only briefly whether the appellate court's decision is consistent with this Court's precedent. Respondent tries to reconcile the appellate court's decision with *Washington Post*, but only does so by quoting the case out of context. Respondent relies on the Court's statement in *Washington Post* that disclosure is not determined by the "label of the file which contains the damaging information." Opp. at 6-7. In *Washington Post*, however, the Court plainly recognized that antecedent to any

balancing of an individual's interest in keeping certain types of information private and the public interest in having that same information disclosed is a "threshold test" inquiring into whether the information at issue is contained in a personnel, medical or similar file. *Washington Post*, 456 U.S. at 602 n.4. The Court's admonition about the label on the file in which the information is contained should not be taken as justification for applying Exemption 6's balancing test to *any* type of information *regardless* of the type of file in which it is contained. The Court in *Washington Post* did not give a green light to agencies to disregard the plain language of Exemption 6.[1]

Respondent's unrestrained view of the scope of Exemption 6 is well illustrated by its reliance on the Court's recent ruling in *National Archives & Records Admin. v. Favish*, 124 S. Ct. 1579 (2004). In *Favish*, the Court recognized that, in certain circumstances, the privacy interests protected by FOIA Exemption 7(C) extend to the family members of deceased persons. *Id.* at 1578. *Favish* says nothing about any conceivable privacy interest that government employees may possess when their names appear

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[1] Respondent also argues that application of Exemption 6 is particularly appropriate where the information at issue concerns "lower-level employees." Opp. at 5 (citing *Perlman v. Department of Justice*, 312 F.3d 100 (2d Cir. 2002). However, the court in *Perlman* only looked at the employee's status as one factor to consider in balancing the privacy interests at stake against the public interest in disclosure, not in addressing the threshold question of whether the record in question constituted a "similar" file.

in government files about third parties. It certainly does not shed any light on what constitutes a "similar file" under Exemption 6.

Respondent's reliance on *Favish* does reveal, however, the government's apparent inability to resist exploiting FOIA's privacy exemptions to withhold information from public scrutiny. As demonstrated in the Petition, the use of Exemption 6 has increased dramatically in recent years. Despite the plain language of the statute and this Court's past rulings, agencies are now using Exemption 6 to routinely withhold the names of government employees, regardless of the subject matter or type of file in which the names are found. Clearly, it is difficult, if not impossible, for the public to investigate and understand "what the government is up to" if the names of government employees are so easily exempt from disclosure. *Favish* does not justify or excuse such an expansive reading of Exemption 6.

Finally, Respondent makes the curious assertion that Petitioner "has not disputed" that the audit and related records at issue constitute "similar files" within the meaning of Exemption 6 and claims that Petitioner previously "conceded" that an IRS employee's telephone number was withheld properly. Opp. at 7. Of course, Petitioner has always maintained that the records at issue were detailed government records about Petitioner and can be identified as applying to Petitioner. *Washington Post*, 456 U.S. at 602. That does not mean, however, that those same records also constitute detailed government records on a government employee and can be identified as applying to that employee. *Id.* An IRS employee's name in Petitioner's audit file does not transform the audit file into a personnel, medical or similar file on *that*

employee. Moreover, the fact that Petitioner elected not to challenge the withholding of a telephone number of an government employee in no way constitutes the "concession" Respondent claims it to be, nor does it alter Petitioner's entitlement to the names of government employees that appear in Petitioner's own audit file.

In short, the issue raised in the Petition has broad significance well beyond this case, justifying review by this Court. The appellate court's decision assumes that the mere name of a government employee in a file about a third party transforms that file into a "medical, personnel or similar files" about that employee. It also effectively removes from FOIA the entire first part of the two-part test set forth in Exemption 6 and ignores the admonition of this Court to interpret the disclosure provisions of FOIA broadly and to interpret its exemption provisions narrowly. More importantly, if the appellate court's decision is allowed to stand, it will significantly narrow the view through an essential window on government activity that is vital to an open society.

Respectfully submitted,

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(202) 646-5172

September 2004

Counsel for Petitioner

*Denotes Counsel of Record

[redacted] HQ02

n: [redacted] HQ02
Sent: Monday, February 24, 2003 1:21 PM
To: [redacted] HQ02; [redacted] HQ02; [redacted] HQ02; [redacted] A HQ02; [redacted] SWD; [redacted] COL HQ02; [redacted] SWT
Cc: [redacted] HQ02; [redacted] HQ02; [redacted] HQ02; [redacted] HQ02; [redacted] HQ02; [redacted] HQ02
Subject: RE: oil

A-1

[redacted]

I'm attaching to this notes that I sent out to everyone on Friday evening so all addressed here w information that I provided in most comprehensive form. I am going to include LTG Flowers bec on the Friday evening notes. I believe all should clearly understand the challenges from the OS information does not get filtered through so many where we sometimes lose accuracy.

A-1

[redacted]

-----Original Message-----
From: [redacted] HQ02
Sent: Friday, February 21, 2003 6:13 PM
To: [redacted] SWD
Cc: [redacted] MG HQ02; [redacted] HQ02; [redacted] HQ02; [redacted] L HQ02; [redacted] HQ02; [redacted] L HQ02; [redacted] HQ02; [redacted] HQ02; [redacted] HQ02; [redacted] HQ02; [redacted] HQ02; [redacted] SWD; [redacted] VT; [redacted] HQ02
Subject: Update

[redacted]

I bring the following to your attention for information and action of your staff:

a. **Acquisition Plan** --PARC approved with contingencies the Acquisition Plan, 20 February 2003. A copy of the Plan is being sent to HQDA for their information and for the information of OSD. UOC should also send the plan back to SWD for your folks to review and work the contingencies. Working out the contingencies, making the corrections and clarifications do not have to return to the PARC for any additional review.

b. **J&As** -- The J&As at HQDA have not been approved yet. I spoke with [redacted] (OSD) and she stated that the earliest that she can provide her input regarding the sole source J&A to HQDA would be Tuesday, 25 February 2003. [redacted] also stated that her priorities for approval will be Sole source J&A and later Limited Competition J&A -- the J&As will not be considered for approval concurrently. According to [redacted], because of other pressing issues regarding the overarching Campaign, there is no way to accelerate earlier than Tuesday, 25 February 2003. However, see below an additional OSD requirement that must be provided by SWD and I would say at this time, no later than Monday, 24 February 2003, that conditions that approval of the J&A. [redacted] will be able to provide on Monday, 24 February 2003. after checking with the HQDA reviewers of the J&A, the Army target date for the approval.

c. **Acquisition Strategy Requirement** -- OSD sent a letter to HQDA on 07 February 2003, Subject: Management and Oversight of Acquisition of Services Process, where Under Secretary Aldridge has directed that the Army Acquisition Executive notify him before approving the acquisition strategy for any acquisition services with a total planned dollar value equal to or greater that $2 billion, so that Secretary Aldridge may make a determination as to any OSD special inerest and he AAE must keep Secretary Aldridge apprised of actions to address significant cost, schedule, or performance problems n any acquisition of services that exceeds the @ billion threshold. **The Acquisition Strategy must be submitted to OSD in the format of Attachment A to the letter not later than Monday, 24 February 2003 for [redacted] to get it approved. She will not provide input on the J&A until the Acquisition Strategy is approved. I faxed the package to support revision of the Acquisition Strategy to [redacted] and [redacted] to coordinate completion of that**

EXHIBIT 1

BEST AVAILABLE COPY

A-2

[redacted] HQ02

From: [redacted] SWT
Sent: Thursday, February 27, 2003 5:43 PM
To: [redacted] SWD; [redacted] HQ02; [redacted] SPD
Cc: [redacted] SWD; [redacted] SWD; [redacted] SWD; [redacted] SWT; [redacted] AKO; [redacted] SWD; [redacted] SWD; [redacted] SWD
Subject: RE: Update from [redacted]

A-2

Sir,

I understand that the exec summary that we sent to [redacted] has not been forwarded to y SIPR mail is snail mail. We must get better at this. [redacted] is contacting [redacted] Sorry about the delay. Al and I finished the more detailed version of the meeting minutes tc distributing it.

[redacted]

-----Original Message-----
From: [redacted] SWD
Sent: Thursday, February 27, 2003 3:27 PM
To: [redacted] HQ02; [redacted] SWT
Cc: [redacted] SWD; [redacted] SWD; [redacted] SWD; [redacted] SWT; [redacted] AKO; [redacted] SWD; [redacted] SWD; [redacted] SWD
Subject: RE: Update from [redacted]

[redacted]

Thanks. Will view the classified version this evening.

[redacted]

-----Original Message-----
From: [redacted] HQ02
Sent: Thursday, February 27, 2003 2:17 PM
To: [redacted] SWD
Cc: [redacted] SWD; [redacted] SWD; [redacted] SWD; [redacted] SWT; [redacted] AKO; [redacted] SWD; [redacted] SWD; [redacted] SWD
Subject: Update from [redacted]

Sir,

Figured that I better check in and report progress. [redacted] called me at 0930 today at the HQ building where I'm working today and said that the Exec Summary for [redacted] which was due at 0800 tomorrow was needed at 1030 this morning. I got it to [redacted] in time, but did not get a chance to send it to you for your review due to the short notice. Some edits were made by [redacted] and [redacted] and I'll SIPR it to you just as soon as I get a final copy back.

I also have more detailed meeting minutes which I'll be sending out this PM or early in the morning.

[redacted] and [redacted] have been working issues feverishly. The meeting was effective in generating a sense of urgency. The J&A for the sole source has been revised and staffed, is sitting on the desk of the ASA(ALT) awaiting signature in the morning (28 Feb). We still need indemnification.

EX. 6

[redacted]HQ02

From: [redacted], OSD-ATL [redacted]@osd.mil]
Sent: Sunday, March 02, 2003 1:22 PM
To: [redacted]@HQ02.USACE.ARMY.MIL'; Fr[redacted]; [redacted]@us.army.mil; [redacted]; A[redacted]; OSD-ATL; [redacted]@us.army.mil; [redacted]@us.army.mil; [redacted]@us.army.mil
Cc: [redacted]
Subject: RE: J&A Preparation

A-3

Correction for unclas emails intended to reach [redacted].

A-3

[redacted]@osd.mil <mailto:[redacted]@osd.mil>
(Leave out the second "t" in the last name - otherwise the message will go to a desk I'm not a

-----Original Message-----
From: [redacted]@HQ02.USACE.ARMY.MIL [redacted]@HQ02.USAC
Sent: Monday, February 10, 2003 6:56 PM
To: [redacted]@HQ02.USACE.ARMY.MIL; [redacted]@us.army.mil; [redacted]@HQ02.USACE.ARMY.MIL; [redacted]@HQ02.USACE.ARMY.MIL; [redacted]@osd.mil; [redacted]@us.army.mil; [redacted]@HQ02.USACE.ARMY.MIL; [redacted]@HQ02.USACE.ARMY.MIL; [redacted]@us.army.mil; [redacted]@us.army.mil
Cc: [redacted]@swd02.usace.army.mil; [redacted]@swd02.usace.army.mil; [redacted]@HQ02.USACE.ARMY.MIL
Subject: RE: J&A Preparation

Just a correction for me: [redacted]@hq02.usace.army.mil [redacted]a@hq02.usace.army.mil>
[redacted]

-----Original Message-----
From: [redacted]HQ02
Sent: Monday, February 10, 2003 6:40 PM
To: [redacted]SAALT'; [redacted]HQ02; [redacted]HQ02; [redacted]H HQ02; [redacted]HQ02; [redacted]HQ02; [redacted]HQ02; [redacted]HQ02; [redacted]HQ02;
Cc: [redacted]SWD; [redacted]SWD; [redacted]HQ02
Subject: FW: J&A Preparation

All,

I'll add to the list of contacts present at HQUSACE at today's VTC.

[redacted], ASA(ALT), SAAL-ZP, 703-604-7006, [redacted]@saalt.army.mil <mailto:[redacted]@saalt.army.mil>

[redacted], OSD, 703-692-6696, [redacted]@osd.mil <mailto:[redacted]@osd.mil>

[redacted], USAMC, Judge Advocate, 703-617-2556, [redacted]@us.army.mil <mailto:[redacted]@us.army.mil>

SIPR: [redacted]

[redacted], HQUSACE, Office of Chief Counsel, 202-761-8524, [redacted]@hq02.usace.army.mil <mailto:[redacted]@hq02.usace.army.mil>

EXHIBIT 3